Office-Supreme Court, U.S. FILED

NOV 5 1984

No.

ALEXANDER L. STEVAS, CLERK

In the

Supreme Court of the United States

October Term, 1984

GAIL PAPPALARDI.

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

GAIL PAPPALARDI Petitioner pro se c/o COMER & MEYERSON 6 East 45 Street New York, New York 10017 (212) 682-6410

PRINTINGHOUSE PRESS - (212) 719-3120



QUESTION PRESENTED

1. Was it a violation of the petitioner's constitutional rights under the 6th Amendment of the U.S. Constitution as made applicable to the states by the 14th Amendment, when the trial court refused to grant a mistrial or to give a cautionary instruction to the jury to cure the closing remarks of the prosecutor that the petitioner's request for an attorney was evidence of a consciousness of guilt.

- ii -

TABLE OF CONTENTS

	rage
Question Presented	i
Cable of Authorities	iii
Opinion Below	2
Turisdiction	2
Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations Involved	3
Statement of the Case	5
Reasons for Granting the Writ	19
THE NEW YORK COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.	
Conclusion	28
appendix	
Order of the Court of Appeals of the State of New York	1A
Order of the Appellate Division,	
First Department	2A

THE RESERVE OF THE PROPERTY OF

- iii -

TABLE OF AUTHORITIES

People v. Conyers	
49 N.Y. 2d 182	
(N.Y. Court of Appeals, 1980)	23
People v. Simon	
75 A.D. 2d 156	
App. Div., (First Dept., 1980)	23
People v. Sharp	
119 Misc. 2d 200	
(Crim. Ct., NY County, 1983)	23
STATUTES AND OTHER AUTHORITIES	
N.Y. Penal Law Section 125,	
25, subdivision 1	5
Rule 17.1(c) Rules of the	
United States Supreme Court	2
28 U.S.C. Section 1257 (3)	2
U.S. Constitution, Amendment V	22
U.S. Constitution, Amendment VI	3, 19
	20,22
U.S. Constitution, Amendment XIV	4,19

IN THE

SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1984

No. Gail Pappalardi, Petitioner,

- against --

THE PEOPLE OF THE STATE OF NEW YORK Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner, GAIL PAPPALARDI, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this proceeding on September 10, 1984.

OPINION BELOW

The opinion of the New York Court of Appeals, not reported, and the opinion of the Appellate Division of the State of New York, First Department, appear in the Appendix hereto.

JURISDICTION

The judgment of the New York Court of Appeals, the highest tribunal in the State of New York was entered on September 10, 1984. No motion for rehearing was filed. This petition for certiorari was filed within sixty (60) days of judgment. This court's jurisdiction in invoked under 28 U.S.C. Section 1257(3) and Rule 17.1 (c) of

the Rules of the United States
Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

AMENDMENT VI - JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

The second of th

obtaining witnesses in his favor, and to have the Assistance of Counsel for the defense.

AMENDMENT XIV.CITIZENSHIP: PRIVILEGES
AND IMMUNITIES: DUE PROCESS; EQUAL
PROTECTION: APPORTIONMENT OF
REPRESENTATION; DISQUALIFICATION OF
OFFICERS: PUBLIC DEBT: ENFORCEMENT

Section 1.

All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

AL HOLDING

The time of the control of the contr

deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered in the Supreme Court, New York County on September 22, 1983, and from the sentence imposed thereon.

On April 25, 1983, an indictment was filed in the County of New York against Gail Pappalardi. It charged the defendant with one count of murder in the second degree under Penal Law Section 125.25, subdivision 1, allegedly committed as follows: "The defendant in the County of New York on or about April 17, 1983, with intent to cause the death of Felix Pappalardi, caused the death of Felix Pappalardi,

on first on the count of marine

and of the count of the count of marine

the defination of the count of the count of marine

defination like the count of the co

by shooting him with a pistol."

The hearing on defendant's motion to suppress tangible evidence and statements, and the trial of the indictment which followed immediately thereafter, were held before Justice James Leff, in Part 67, New York County, Supreme Court, commencing on August 31, 1983.

The Court submitted to the jury that one count of Murder contained in the indictment; in addition, and over the objection of the defendant, the Court submitted as lesser included offenses, Manslaughter in the first degree, Manslaughter in the second degree and Criminally Negligent Homicide.

The jury returned verdicts of not guilty on the Murder and Manslaughter

counts, and guilty on Criminally Negligent Homicide.

On October 12, 1983, the Court imposed on the defendant the maximum sentence allowed by law, imprisonment for a term of one and one-third to four years.

On June 28, 1984, the Appellate Division, First Department unanimously affirmed the conviction without opinion. On September 10, 1984, the New York Court of Appeals denied permission to appeal.

The one count Indictment alleged that the defendant with the intent to cause the death of Felix Pappalardi, caused the death of Felix Pappalardi, by shooting him with a pistol.

During all phases of the trial, the People maintained only one theory:

system of the sensing the private system appears not

that the defendant intentionally shot and killed her husband. At no time, did the People argue that the defendant was guilty of any of the so-called lesser included offenses.

On opening, the People stated that they intended to prove that the defendant intentionally killed her husband in anger. Assistant D.A. Barden argued that documentary and testimonial evidence would be introduced to demonstrate that defendant and her husband had a marital relationship that deteriorated throughout the years; that Felix Pappalardi came home between 5:00 to 5:30 a.m. on the 17th day of April, 1983 (a Sunday), exchanged words with Mr. Wesly Clerge, the doorman of the apartment building where Felix and Gail Pappalardi resided; that a neighbor heard noises of loud talking and music; that the defendant called the police and admitted that she had shot her husband; that the Chief Medical Examiner, Dr. Elliot Gross performed an autopsy showing that Mr. Pappalardi had died as a result of a bullet wound.

During the People's case, two telephone calls were admitted into evidence, over objection. One was a call from the defendant to "911" Emergency. The second call was from the 911 Police Unit calling the defendant subsequent to the first call. The calls stated as follows:

"April 17, 1983 Call # 1

Opr: 177...where's the emergency? F/V: Number 30 Waterside Plaza.

OPR: number thir..

F/V: Off 34th...ah...23rd Street. Opr: Number 30 Waterside Plaza.

April 17, 1981

The second of th

THE PARTY OF STREET, AND THE PARTY OF STREET, STREET,

F/V: Yes.

Opr: What, what's wrong there?

F/V: The entrance is off tw...twenty-

second..

Opr: What apartment are you in, Miss? F/V: Five, er, yes, and D for David.

opr: 5D for David.

F/V: Yes

Opr: On the 5th floor? F/V: Please hurry.

Opr: Ma'am...5th floor? F/V: Five D for David...

F/V: Five D for David...
Opr: ...David...on what floor?

F/V: Five.

Opr: And what is your telephone number?

F/V: 683-3576. A man is dying.

Opr: Ma'am stay on the line...do not hang up...I am connecting you to the emerg...

F/V: I must call my lawyer.

Opr: Listen to me...what is the problem there?

I believe I've shot him...I

didn't mean to but I did.

Opr: You shot a man?

F/V: I think so...you're wasting...

Opr: O.K.

F/V:

F/V: ...time...

Opr: O.K., listen...

F/V: Please.

Opr: O.K., Ma'am uh...someone will be there as soon as possible, Ma'am.

F/V: Thank you, thank you.

Opr: O.K. Ma'am."

"April 17, 1983 Call #2.

Opr: Units -- (phone stops ringing)
Hello.

F/V: Yes.

Opr: O.K. Stand by...I'm trying to get you a...

F/V: Yes.
Opr: Hello.
F/V: Yes.

Opr: Yeah, listen, this is the Police Department.

F/V: Yes.

Opr: You called? F/V: Of course.

Opr: What's the matter?

F/V: I believe I sh...I killed my husband.

Opr: You didn't mean to?

F/V: But ...

Opr: Is he moving any at all?

F/V: Not at all, and it, it was right in the throat, I think it was the carotid, I don't know how to do first aid.

Opr: Well listen...

F/V: Help me.

Opr: Miss, Miss, Miss, calm down, they're on their way there. You know, anything else you want to tell me?

F/V: Like what?

Opr: What, h..., you know, how did you do it?

F/V: Anger...but, ah, not intentional, never, never, never.

Opr: O.K. listen, they're on their

way up, all right?

F/V: Thank you.

common and another and a still	
	- 3/25
	•
TOU DION'T NEED FOR	
128987	
Thank you.	

Opr: Sit tight, at the house.

F/V: Thank you. Opr: Where is...

F/V: I need to get dressed and be

ready.

Opr: Where is it? Oh, you don't have

any clothes on?

F/V: Number 30, Waterside Plaza,

please hurry.

Opr: Yeah, put something on because they'll be there in a few

minutes.

F/V: Yes, all right.

Opr: All right? F/V: Thank you.

Opr: O.K.

F/V: Goodbye."

On summation, the People clung to the single theory that the defendant intentionally murdered her husband. No mention of negligence or any other theory was ever mentioned.

Mrs. Pappalardi testified and swore that her husband's death was an accident. Mrs. Pappalardi testified that through their approximately 20 years relationship, her husband and she had an "open" relationship and marriage

573.5

provide at passe and continued of the co

non marked plantament and seek according to the contract of th

whereby they each had love relationships with others.

Indeed, the women her husband was currently seeing, Valerie, was a very neurotic and unstable woman who was frequently threatening to commit suicide.

Mrs. Pappalardi admitted problems with her marriage but these problems were mostly the result of her husband's use of heroin and "shooting" cocaine.

With respect to her knowledge of weapons, Mrs. Pappalardi testified that she had shot with rifles and had gone target shooting and skeet shooting.

Her husband attempted to teach her to handle handguns in the past in Nantucket. Felix was an expert with guns and she knew that. He had been in

3.44

and the second

Date of the later of the later

The second secon

restative.

Annual and application and discussion and discussio

the selections therefore with an expense

the tendent attendent or tendent of the court in tendent of the tendent of the court of the cour

the Army, had medals as an expert in guns, and was a very good shot.

Nevertheless, Mrs. Pappalardi never felt comfortable with handguns.

As to the night of the tragic incident, Mrs. Pappalardi testified that on April 16, 1984, she and Felix awoke at approximately 3 to 4 in the afternoon. Between 11 PM and 12 AM of that evening, Felix left to go to the Ritz Nightclub. He asked Mrs. Pappalardi to come with him, but she refused.

Instead she worked at her computer, which required a lot of concentration.

when Felix returned, he wanted her to turn off the computer, which she did not do immediately. Felix went in to the bedroom and they talked from room to room.

The same of the sa

When Mrs. Pappalardi did come into the bedroom to get ready for bed, Felix was lying in bed.

They were talking about many subjects. Felix was talking in a normal tone of voice; he was communicating in a coherent fashion, and his speech was not slurred.

As Mrs. Pappalardi was looking through the chest of drawers, she saw the derringer in the 3rd or 4th drawer. The gun was supposed to be kept in the safe with Felix's other guns.

Mrs. Pappalardi became angry and asked why was she forced to look at the gun.

Instead of putting the gun away, Felix's reaction was to tell Mrs. Pappalardi to shut up and that she was

100

The state of the restaura at the page of

being a baby.

Felix was so "insistent",

"vocal" and "intimidating", that Mrs.

Pappalardi handled the gun and became
familiar with it.

His position was that he was going to Paris and that she would be helpless. He wanted her to stop being stupid about guns and to learn to handle the derringer.

He told her that the gun was not loaded and that she was safe. He directed her to handle the gun and to open and close it.

He explained to her that in order to use the gun, she would have to cock it and in order to release it, she had to put the thumb on the hammer, touch the trigger and ease the hammer back. She did this two or three times.

- 31 -

color a palar

promote the same of the same

and the other property and the second

AL VIOLETTIAN

the second contract of the

and the contract of the contract of the contract of

year have very more rights and market will

- They may make their here between

no see car or banksines of

the state of the s

manufactured to the state of the self. . None

After doing this, he said "See, you can do it". Mr. Pappalardi then said that to be real, she should put a bullet in. She refused to do so. He got upset and told her that she had to know how to defend herself since he will be leaving for Paris. She felt ashamed of being afraid and felt he was very intimidating.

So finally, she followed his instructions and put a bullet in. She was careful and held the gun away from him and her. She was sitting in a couch by the chest of drawers while he was watching her, lying down at the bed more or less facing her.

She cocked and uncocked the gun at least once.

He wanted her to repeat the procedure so that she felt comfortable

The second of th

ton our Assumption has belook with

same transf of

add tonger of red hedney of

while doing it.

Then "something happened" which made her lose her balance and cause the accident. She doesn't remember whether she was still in a couch or standing when the gun went off. Mrs. Pappalardi testified that once the gun went off, she did not remember what occurred.

attended of the

The state of the s

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals has decided an important point of federal law which has not been, but should be, settled by this Court.

The Court of Appeals allowed the affirmance of the conviction of the petitioner to stand affirmed, in derogation of her rights pursuant to the U.S. Constitution.

The issue of paramount importance in the instant case is whether there was a violation of the petitioner's constitutional rights under the Sixth Amendment of the U.S. Constitution as made applicable to the states by the 14th Amendment, when the trial court refused to grant a mistrial or to give a cautionary instruction to

THE RESERVED OF SECOND

The state of the second state of the second

and the second of the second s

the court the thetant and the the same of the same of

the jury to cure the closing remarks of the prosecutor that the petitioner's request for an attorney upon first speaking to the police authorities on the 911 recordings was indicia of consciousness of guilt. It is the petitioner's contention that these remarks were in contravention of the petitioner's absolute right to counsel pursuant to the Sixth Amendment of the U.S. Constitution.

During the summation, the prosecutor told the jury that the defendant's statement on the first 911 tape that she wanted to call her attorney indicated a consciousness of guilt, as follows:

"According to her testimony, the first thing that she thinks of, in the course of speaking to 911, after telling them what the problem is, is I have to call my lawyer. Why? She knew she was in trouble.

The property and seek the period of the peri

Description of the part of the

According to her testimony, the tring to thing the problem the course of speaking to the problem after the problem the testing to the problem.

IN. IN I have to call by lawrer. Why? But they are were in trouble.

She knew what she had done, and she knew that she needed to get in touch with somebody who could give her legal advice."

This remark, was, obviously, greatly prejudicial.

The trial court admitted that the retention of a lawyer has no bearing on guilt or innocence. Yet, not only did the trial court refuse to grant a mistrial, it also refused to cure the prejudice by giving a cautionary instruction.

The comments of the prosecutor during summation that the petitoner's statement to the police authorities during her 911 call that she wanted to call her lawyer signified that "She knew, she was in trouble" and that "she knew what she had done" was an unjustifiable infringement upon the

The same that are there were and

Takanan alam

principle of the contract of the principle of the contract of

appellant's Sixth Amendment right to an attorney.

The prosecutor's comments prejudiced the petitioner as surely as a comment on the silence of a defendant or a suspect in a criminal case would be prejudicial and violative of a defendant or suspect's right not to incriminate himself or herself pursuant to the Fifth Amendment of the U.S. Constitution.

Although the State of New York argued below that this comment was not wrongful or prejudicial because it was a mere comment on the timing of appellant's request for an attorney rather than a comment about her right to an attorney, this argument fails in the same manner that a comment regarding the timing of a suspect's silence would nevertheless be violative

The state of the s

The same and the same of the s

of said suspect's rights.

In other words, just a comment regarding a suspect's silence is an infringement on his or her rights whether such silence was defendant's action (or non-action) as a suspect when first confronted with questions of the police or his or her action in not testifying at a trial. A prosecutor's comment regarding a suspect's request for an attorney as an indication of his or her consciousness of guilt is similarly wrongful no matter when the suspect requesied an attorney. See People v. Conyers, 49 N.Y. 2d 182 (N.Y. Ct. of Appeals, 1980); People v. Simon, 75 A.D. 2d 516 (App. Div., First Dept., 1980); People v. Sharp, 119 Misc. 2d 200 (Crim. Ct., N.Y. County, 1983).

No matter how the State now

.

v. Blasse, 119 Missis 2d 200 (Criss Chapter A

We maken bow the State new

desires to characterize the prosecutor's comments, the plain meaning of the comments was a direct accusation that Mrs. Pappalardi's statement that she wanted to get in touch with an attorney showed "she knew what she had done."* In other words, this was a direct statement that her request for an attorney evidenced that she knew she was guilty of murdering her husband. This is a most heinous type of comment on the proper exercise of petitioner's right and has a

^{*}There can be no question that when the prosecutor referred to what "she had done" she was referring to the People's that the accusation defendant murdered her husband inasmuch as said immediately followed comment Barden's sarcastic reference to an "accidental" shooting. Specifically, Ms. Barden referred to the first 911 "She then goes on to call, as follows: say in the next statement she makes to the 911 operator, I have to call lawyer, in an accidental shooting."

Since the second of the second

Proposition to the state of the

chilling effect on any future suspect's exercise of their constitutional rights.

Moreover, the prosecutor's comments were not a direct or a proper response to the defense summation. Although the defense did point out that Mrs. Pappalardi evinced concern for her husband by calling 911, a proper response would have been to dispute said facts or to show facts evidencing a lack of concern for Felix. A concern for her own legal rights in no manner curtailed her concern for her husband! Nor did the prosecutor argue to the jury that Mrs. Pappalardi's statement that she desired to call her attorney in any way showed a lack of concern for her husband. Thus, the prosecutor's remarks were an improper response to the defense summation. Mrs.

STATE OF THE PARTY OF THE PARTY

Pappalardi's request for an attorney merely showed that she <u>also</u> had a concern about whether or not she would be arrested. Indeed, such concern might merely have been a concern whether she would be arrested for possession of an illegal weapon. For whatever reasons, however, the People never charged her with this latter crime.

Also, the prosecutor's comment that "According to her testimony, the first thing she thinks of was to call her lawyer" was not a factual statement.

Prior to telling 911 that she had to call her lawyer, Mrs. Pappalardi not only called 911, which is the number to call to obtain help in an emergency, but also told 911 that "A man is

Pappalardi's request for an accornay mared with alge had a decorny about whether or not she would be attacked. Indeed with concern attacked, indeed and concern attacked and bearing the second of the papears of an illineal weapon. For whatever reasons, newsper, the Reopte according to the state and according to the second of the second o

that "Addording to her twenty the comment that the call that the call that the thing are thinks of was to call her lawyer" was not a factorial attachment.

to call her lawser, mrs. Tappalarel not to cally only called 911, which is the manper to call to chest as emergency, oall to chest as emergency, but also told 911 that "A man is

dying", to "Please hurry" and gave the address of the building and apartment number so that the authorities would know where the emergency was located.

The State has expressed below the possibility that the jury arrived at a compromise verdict or was expressing leniency.

Indeed, at the sentencing of the petitioner, the prosecutor argued, and the Court adopted the State's position, that the defendant was given "every bit of leniency, every bit of sympathy, every bit of mercy, however, misguided, to Mrs. Pappalardi."

The possibility that there was a compromise verdict or that the jury was merely showing mercy heightens the importance of the prosecutor's comments.

and wave ton "yard seast?" of tonice sometime and the americans trees and tr

The State has espeaned below the possibility that the just acraved as a compression verdict or was espeaning lenius.

radoved, at the nearencing or the positionary the presentar acquad, and the court adopted the states a position.

The court adopted the states a position.

That the detendant was given "every bit of avenuably, of lenished, every bit of avenuably, believed at avenuably, be well as a state of avenuably.

The possibility that there was a compromise vardict or that the line lury was merely whowing sercy heightens the taportance of the prosecutor's comments.

Clearly, such comments were made to convince the jury that Mrs. Pappalardi intentionally murdered her husband; jurors affected by these comments may have held out for a conviction on one of the counts, whereas others may have urged outright acquittal.

CONCLUSION

wherefore, the U.S. Supreme Court should grant a Writ of Certiorari to review the conviction of the petitioner.

Respectfully submitted GAIL PAPPALARDI, Petitioner c/o COMER & MYERSON 6 East 45th Street New York, NY 10017 (212) 682-6410

APPENDIX

ORDER OF THE COURT OF APPEALS, STATE OF NEW YORK, Dated September 10, 1984

STATE OF NEW YORK COURT OF APPEALS

BEFORE: HON. JUDITH S. KAYE

Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK Respondent,

-against-

CERTIFICATE DENYING LRAVE

GAIL PAPPALARDI,

Defendant.

I, JUDITH S. KAYE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the abovenamed appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein * there is no queston of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, NY September 10, 1984

Judith S. Kaye Associate Judge

*Description of order: Order of the Appellate Division, First Department, of June 28, 1984, affirming the judgment of the Supreme Court, New York County, rendered October 12, 1983.

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, NEW YORK SUPREME COURT, Dated June 28, 1984

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on June 28, 1984,

Present: Hon. Theodore R. Kupferman,
Justice Presiding
Sidney H. Asch
Arnold L. Fein
E. Leo Milonas,
Justices

THE PEOPLE OF THE STATE OF NEW YORK Respondent,

-against-

GAIL PAPPALARDI,

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment 20422.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court. New York County (James Leff, J.), rendered on October 12, 1983, convicting defendant of criminally negligent homicide, and said appeal having been argued by Hal Meyerson of counsel for the appellant, and by Bruce Allen of

The second of the second secon

The second second second second

TOUR LANGUAGE STATE

Distance belowed lang-

The same of the sa

the independent hard bedrand angle of court of the court

counsel for the respondent; and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter:

(Illegible) LUGGEI Clerk

Counsel for appellant is referred to section 606.5, Rules of the Appellate Division, First Department.